FILE COPY

JUN 6 1945

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1245.

SAMUEL OKIN, *Petitioner*,

v.

SECURITIES AND EXCHANGE COMMISSION, *Respondent*,

PETITION FOR WRIT OF CERTIORARI TO CORRECT DIMINUTION OF RECORD.

JAMES L. BOONE,
Attorney for United Gas Corporation.

DANIEL JAMES,
Attorney for Electric Power & Light Corporation.

JOHN F. McLANE,
Attorney for Electric Bond and Share Company.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1245.

SAMUEL OKIN, *Petitioner*,

v.

SECURITIES AND EXCHANGE COMMISSION, *Respondent*,

PETITION FOR WRIT OF CERTIORARI TO CORRECT DIMINUTION OF RECORD.

Come now United Gas Corporation, Electric Power & Light Corporation and Electric Bond and Share Company and move this Honorable Court for a writ of certiorari to correct diminution of the record filed with the petition of Samuel Okin for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit. In support of this motion said moving parties state and show:

1. Said moving parties joined in and filed an affidavit in support of the motion of the Securities and Exchange Commission before the Circuit Court of Appeals for the Second Circuit on October 2, 1944, for an order dismissing the petition for review filed by Samuel Okin, seeking review by

the said Court of the order issued by the Securities and Exchange Commission on September 7, 1944, in the proceeding before it pertaining to *United Gas Corporation, Electric Power & Light Corporation* and *Electric Bond and Share Company* (Files No. 70-314, 70-315, 59-21, 4-33, 54-91, 70-868).

2. In support of said motion to dismiss said moving parties filed a notice of motion supported by an affidavit of Wallace P. Zachry, sworn to September 27, 1944 (attached hereto as Exhibit I).

3. An order of the Circuit Court of Appeals for the Second Circuit was entered on December 30, 1944, granting said motion and dismissing said petition of Samuel Okin. Samuel Okin filed with this Court on May 8, 1945, a petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit to review said order entered on December 30, 1944.

4. Said notice of motion and affidavit are a part of the record of the proceedings in the Circuit Court of Appeals for the Second Circuit to which the writ of certiorari is asked to be directed in the petition of Samuel Okin. Said notice of motion and affidavit, however, were omitted from the certified transcript of the record filed in this Court by said Okin with his petition for writ of certiorari.

5. Rule 38 of this Court requires that a petition for writ of certiorari be accompanied by a certified transcript of the record in the case, including the proceedings in the court to which the writ is asked to be directed. Said notice of motion and affidavit are material parts of the record in this case and should be included in the record filed in this Court.

WHEREFORE, said moving parties pray that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to correct this diminution of record and for an order making said notice of motion and affidavit a part

of the record in this Court and requiring said notice of motion and affidavit to be printed as a part of the printed transcript of record; and for such other and further relief as to this Court may seem just.

Dated: June 4, 1945.

JAMES L. BOONE,
Attorney for United Gas Corporation.

DANIEL JAMES,
Attorney for Electric Power & Light Corporation.

JOHN F. MCLANE,
Attorney for Electric Bond and Share Company.

EXHIBIT I.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

In the Matter

of

PETITION OF SAMUEL OKIN, STOCKHOLDER OF ELECTRIC BOND AND SHARE COMPANY, FOR A REVIEW OF AN ORDER OF THE SECURITIES AND EXCHANGE COMMISSION DATED THE 7TH DAY OF SEPTEMBER, 1944, PERTAINING TO ELECTRIC BOND AND SHARE COMPANY, ELECTRIC POWER & LIGHT CORPORATION AND UNITED GAS CORPORATION, FILES NO. 70-314, 70-315, 59-21, 4-33, 54-91, 70-868.

NOTICE OF MOTION.

SIRS:

PLEASE TAKE NOTICE that upon the affidavit of Wallace P. Zachry, sworn to the 27th day of September, 1944, a copy of which is attached hereto, and upon the other papers and proceedings herein, the undersigned will join in the motion to be made by the Securities and Exchange Commission before the Circuit Court of Appeals in the Court Room of said Court, in the Federal Court House, Foley Square, Borough of Manhattan, City of New York, on the 2nd day of October, 1944, at 10:30 in the forenoon of that day or as soon thereafter as counsel can be heard, for an order dismissing the petition for review filed herein by Samuel Okin, seeking the review by this Court of the order issued by the Securities and Exchange Commission on September 7, 1944, in the proceedings before it entitled *In the Matter of United Gas Corporation, Electric Power & Light Corporation and Electric Bond and Share Company,* File

No. 54-91 (SEC Holding Company Act Release No. 5271).
Dated: New York, N. Y., September 27, 1944.

Yours, etc.,

REID & PRIEST,
Counsel for United Gas Corporation,
Office and P. O. Addres,
2 Rector Street,
New York 6, N. Y.

WRIGHT, GORDON, ZACHRY, PARLIN & CAHILL,
Counsel for Electric Power & Light Corporation,
Office and P. O. Address,
63 Wall Street,
New York 5, N. Y.

SIMPSON, THATCHER & BARTLETT,
Counsel for Electric Bond and Share Company,
Office and P. O. Address,
120 Broadway,
New York 5, N. Y.

TO:

SAMUEL OKIN, ESQ.,
32 Broadway,
New York 5, N. Y.

ROGER W. FOSTER, SOLICITOR,
SECURITIES AND EXCHANGE COMMISSION,
18th and Locust Streets,
Philadelphia 3, Pa.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

In the Matter

of

PETITION OF SAMUEL OKIN, STOCKHOLDER OF ELECTRIC BOND AND SHARE COMPANY, FOR A REVIEW OF AN ORDER OF THE SECURITIES AND EXCHANGE COMMISSION DATED THE 7TH DAY OF SEPTEMBER, 1944, PERTAINING TO ELECTRIC BOND AND SHARE COMPANY, ELECTRIC POWER & LIGHT CORPORATION AND UNITED GAS CORPORATION, FILES No. 70-314, 70-315, 59-21, 4-33, 54-91, 70-868.

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS PETITION FOR REVIEW FILED HEREIN BY SAMUEL OKIN.

UNITED STATES OF AMERICA,)
STATE OF NEW YORK,) ss.:
COUNTY OF NEW YORK,)

WALLACE P. ZACHRY, being duly sworn, deposes and says that:

1. He is a member of the firm of Wright, Gordon, Zachry, Parlin & Cahill, having offices at No. 63 Wall Street in the City of New York. His firm is counsel for Electric Power & Light Corporation (herein called Electric), one of the proponents of the Plan of Reorganization approved by the order here sought to be reviewed and one of the parties to the proceedings below before the Securities and Exchange Commisison. He is personally familiar with the proceedings and other matters herein referred to, except as to the information set forth in paragraphs 6 and 7 hereof, which is stated upon information and belief.

2. United Gas Corporation (herein called United), Electric, and Electric Bond and Share Company (herein called

Bond and Share) join in and support the motion of the Securities and Exchange Commission to dismiss the petition of Samuel Okin to this Court, seeking the review of the Commisison's order of September 7, 1944 (SEC Holding Company Act Release No. 5271, Exhibit A hereto), approving the Plan of Reorganization of United Gas Corporation Under Section 11(e) of the Public Utility Holding Company Act of 1935 (herein called the Plan) (Exhibit B hereto). Said parties join in said motion for dismissal on the ground that Okin's petition to this Court for review pursuant to Section 24(a) of the Public Utility Holding Company Act of 1935 (herein called the Act) is not the proper appellate remedy in this case. The facts bearing upon the foregoing contention are as follows:

I.

3. Although the general power of review whereby orders of the Commission become subject to appellate proceedings is contained in Section 24(a) of the Act, pursuant to which the petitioner Okin has filed his present petition, the Act sets forth a special statutory scheme for the securing of court review of orders of the Commission approving plans filed under Section 11(e) of the Act. Section 11(e) provides for the proceedings before the Commission leading up to the approval of a voluntary plan by the Commission, and after providing for such approval, the Act then goes on to provide:

> "* * * the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the com-

pany or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed."

4. At the request of the proponents of the United Plan, the Commission filed an application for the enforcement of the terms and provisions of the Plan in the District Court of the United States for the District of Delaware, and on September 8, 1944, the Honorable Paul Leahy, United States District Judge, signed an order which, among other things, provided for a hearing on September 29, 1944, before that Court, looking to such enforcement of the Plan. Said order also provided for the notice to be given by mail and by publication of the holding of said hearing, and a copy of said order has been served upon the petitioner Okin. A copy of the order, together with the related petition and form of notice, is attached hereto as Exhibit C. (It may be mentioned in passing that the order contains certain language enjoining persons from taking any action interfering with the proceedings before the District Court or with the carrying out of the Plan "other than * * * such review, if any, in the Circuit Court of Appeals as may be provided by law." In order to avoid the trial of a false issue, it should be pointed out that the proponents of the Plan do not contend that this injunction has any bearing on the present motion to dismiss.)

5. After hearings shall have been held before Judge Leahy, and when and if an order shall have been entered by him enforcing the Plan, the Commission's order approving the Plan will for the first time be operative, and action thereunder for the first time can be taken. The Plan itself does not contain an application for a final, effective and operative order of the Commission, but contemplates only

a Commission order of approval as a step leading up to an enforcement order of an appropriate District Court of the United States, as provided in the Act. Part V of the Plan provides, among other things, as follows:

> "The effectuation of the Plan is subject to the following conditions and reservations:
>
> • • •
>
> "B. The Commission shall have instituted a proceeding in a court of competent jurisdiction pursuant to Section 11(e) of the Act and such court shall have entered a final decree or order finding the Plan to be fair and equitable and appropriate to effectuate the provisions of Section 11 of the Act, and such court shall have taken action to enforce and carry out the terms and provisions of the Plan."

Similarly, the order of the Commission approving the Plan and here sought to be reviewed contains the following condition to its effectiveness:

> "IT IS FURTHER ORDERED that counsel for the Commission be, and they hereby are, authorized and directed to make application forthwith on behalf of the Commission to an appropriate United States District Court pursuant to the provisions of sub-section (f) of Section 18 of the Act to enforce and carry out the terms and provisions of the Plan.
>
> "IT IS FURTHER ORDERED that this Order shall not be operative to authorize the consummation of any transactions proposed in the Plan until an appropriate United States District Court shall, upon application of the Commission, enter an order enforcing the Plan herein approved."

Since both the Plan and the Commission's order are by their terms conditioned upon the entry of an enforcement order by the District Court, it will be only after proceedings shall have been held before the District Court and the favorable order of the District Court shall have been en-

tered that any reviewing appellate court can determine whether the decision on the Plan, embodied in the orders of the Commission and of the District Court, is a lawful and fair and equitable determination of the substantive rights involved, and whether such decision embodied in such Court and Commission orders has accorded to all parties their full procedural and constitutional rights. In such proceedings as this, involving a plan under Section 11(e) of the Act and enforcement of the plan in a District Court under the scheme provided by that section of the Act, it is inconceivable that Congress intended that one Circuit Court of Appeals should review the Commission's order standing alone, which may well be ineffective and therefore give rise to only a moot issue on appeal, and that another Circuit Court of Appeals should review the order of the District Court enforcing the Plan, carrying with it the same Commission order approving the Plan. Such burdensome and expensive and confusing duplication of effort cannot have been the legislative intent.

II.

6. The need for an expeditious determination of the appeal of petitioner Okin cannot be over-emphasized. United is the largest natural gas corporation in the world. Directly and indirectly more than 135,000 security holders are interested in it, and Okin is only one among such 135,000, his holdings amounting to approximately 0.17 per cent of the common stock of the top company, Bond and Share. The cost of maintaining the present capital structure of United is estimated by its management to be approximately $10,000 per day more than the cost will be of maintaining the proposed capital structure upon consummation of the Plan. Moreover, the Plan involves, and its consummation is conditioned upon, the issuance by United of $100,000,000 of new first mortgage bonds which

can be sold in the present money market to institutional investors at the flat price of 100 and at the favorable interest rate of 3 per cent. In the fluctuating state of world affairs which now obtains, United's management, as well as the managements of Electric and of Bond and Share as the direct and indirect parents of United, consider any delay which might jeopardize such favorable bond financing to be highly hazardous to United, Electric, Bond and Share and their respective security holders.

7. In any consideration of whether this Court should expeditiously dispose of petitioner Okin's petition for review, certain facts regarding Okin's activities in connection with matters affecting Bond and Share and its subsidiary companies have a distinct bearing. Okin has on numerous occasions been before this Court and other courts in connection with such matters. See, for example:

Okin v. *Securities and Exchange Commission*, 46 F. Supp. 481 (S. D. N. Y., 1942), *aff'd per curiam*, 130 F. (2d) 903 (C. C. A. 2nd, 1942), cert. denied, 317 U. S. 701 (1943);

Okin v. *Securities and Exchange Commission*, 137 F. (2d) 398 (C. C. A. 2nd, 1943);

Okin v. *Securities and Exchange Commission* (C. C. A. 2nd, July 10, 1944), C. C. H. Federal Securities Law Service, par. 90,256;

Okin v. *Securities and Exchange Commission* (C. C. A. 2nd, July 10, 1944), C. C. H. Federal Securities Law Service, par. 90,257;

Okin v. *Securities and Exchange Commission* (C. C. A. 2nd, July 14, 1944), C. C. H. Federal Securities Law Service, par. 90,258.

Okin has appeared in most of the proceedings before the Commission affecting Bond and Share and its subsidiaries, and when he has appeared, his objections, motions, cross-examination and other activities have usually consumed

substantially more of the record than is consumed by counsel for either the companies or the Commission. Indeed, in the present case it is estimated that more than one-half of the record on the Plan hearings consists of Okin's cross-examination, motions, etc. He has on numerous occasions refused to obey the instructions of the Trial Examiner of the Commission, and has on several occasions become so boisterous that Trial Examiners holding hearings in other hearing rooms of the Commission have had to complain of the interruption of their hearings on other and unrelated matters due to the noise and disturbance caused by Okin. As recently as September 26, 1944, the Commission itself was disturbed in the conduct of a hearing by the shouting of Okin before a Trial Examiner in another hearing, and had to request the Trial Examiner to instruct Okin to conduct himself more properly. The affiant has had a great deal of experience in hearings before Trial Examiners of the Commission, but has never heard of such a complaint with respect to any other lawyer or other person appearing before the Commission or one of its Trial Examiners. On the September 26th occasion, Okin's activities were not confined to shouting at the Trial Examiner. In addition, he burst into a hearing before the Commission, on an unrelated case, interrupted counsel in that matter in his argument, and demanded to be heard by the Commission then and there on a ruling of the Trial Examiner. On several occasions Trial Examiners have had to exclude Okin from further participation in hearings regarding Bond and Share matters because of Okin's obstreperousness. Okin's insistent participation in proceedings before the Commission concerning Bond and Share matters has not been confined to such matters as concern him less indirectly, but he has spent days in cross-examination of witnesses on such remote and contingent questions, from his standpoint, as the fees to be paid by United to plaintiffs' counsel upon the settlement of stockholders' derivative actions affecting that

indirect subsidiary of the corporation in which Okin holds a small common stock interest.

On the basis of the facts hereinbefore set forth, it is earnestly urged that the petition for review filed herein by Samuel Okin, seeking the review by this Court of the order of the Securities and Exchange Commission issued September 7, 1944 (Holding Company Act Release No. 5271), should be dismissed.

WALLACE P. ZACHRY.

Sworn to before me this 27th day of September, 1944.

[NOTARIAL SEAL] MARY F. HEWITT,
Notary Public.

King's Co. Clk's No. 204, Reg. No. 243H6.
N. Y. Co. Clk's No. 614, Reg. No. 332H6
Commission Expires March 30, 1946.

Exhibit A. Order of Securities and Exchange Commission dated September 7, 1944, approving Plan of Reorganization of United Gas Corporation—Printed in transcript of record at pages 62-71, inclusive.

Exhibit B. Plan of Reorganization of United Gas Corporation under Section 11(e) of the Public Utility Holding Company Act of 1935—Included in record but not printed.

Exhibit C. Petition of Securities and Exchange Commission and order thereon dated September 8, 1944, of United States District Court for the District of Delaware providing for hearing on the Plan, etc.—Printed in transcript of record at pages 72-85, inclusive.